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No. 00-327

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARTIN H. TANKLEFF,

Petitioner,

v.

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES AND ATTORNEY GENERAL OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE FACTS ARE LARGELY IRRELEVANT TO THE *ELSTAD* ISSUE BEFORE THE COURT 1

II. THE CIRCUIT SPLIT IS REAL 2

III. *DICKERSON* SHOWS THE NEED FOR REVIEW 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Agostini v. Felton,
521 U.S. 203 (1997) 9

Correll v. Thompson,
63 F.3d 1279 (4th Cir. 1995)..... 5-6

D.C. v. Tri County Industries, Inc.,
No. 99-1953 (S. Ct. Sept. 26, 2000) 9

Dickerson v. United States,
120 S. Ct. 2326 (2000)..... *passim*

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 9

Oregon v. Elstad,
470 U.S. 298 (1985) ..... *passim*

Tankleff v. Senkowski,
135 F.3d 235 (2d Cir. 1998)..... *passim*

Teague v. Lane,
489 U.S. 288 (1989) 7-8

United States v. Byram,
145 F.3d 405 (1st Cir. 1998) 3-4

United States v. Bengivenga,
845 F.2d 593 (5th Cir. 1988) (*en banc*) 7

United States v. Carter,
884 F.2d 368 (8th Cir. 1989) ..... *passim*

United States v. Elie,
111 F.3d 1135 (4th Cir. 1997) 8

United States v. Gale,
952 F.2d 1412 (D.C. Cir. 1992) 5

United States v. Gupta,
183 F.3d 615 (7th Cir. 1999) 6-7

United States v. Johnson,
816 F.2d 918 (3d Cir. 1987) 6, 7

United States v. McCurdy,
40 F.3d 1111 (10th Cir. 1994) 5

United States v. Sangineto–Miranda,
859 F.2d 1501 (6th Cir. 1988) 6, 7

I. THE FACTS ARE LARGELY IRRELEVANT TO THE *ELSTAD* ISSUE BEFORE THE COURT

Respondents predictably suggest that this case is fact-bound by rehearsing various self-serving points from proceedings below. Almost none of the cited facts are relevant to the issue before this Court, however.[1] The single key fact that sets up the instant legal question is that there was no break whatsoever between the lengthy un-*Mirandized* and the briefer *Mirandized* portions of Marty's custodial interrogation. This fact is undisputed. *See* Op. Br. at 12-13.

The issue presented deals with what the Second Circuit did after finding that Marty's *Miranda* rights were violated. The court reasoned that under *Oregon v. Elstad*, 470 U.S. 298 (1985), the admissibility of statements elicited after a *Miranda* violation turns "solely" on whether they were "knowingly and voluntarily made" (App. at 15) – which the court determines by testing the voluntariness of the pre-warning confession – because the court believed that *Elstad* forbade a "tainted fruits" analysis in any circumstances.

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[1] In addition, most of these purported "facts" are bitterly disputed. We offer three illustrative, but by no means exhaustive, examples. Respondents assert that Marty made a "brief statement while he was in custody" for "about nine minutes," before receiving *Miranda* warnings. Brief In Opposition ("Op. Br.") at 1, 4. In fact, though, the Second Circuit never finally determined the minute when Marty was first "in custody" for these purposes, while also noting that it was "much earlier" than when he received *Miranda* warnings. App. at 14a. Respondents belittle Marty's testimony that his mother's "room was dark and that he could not see anyone inside," by comparison to Suffolk County Detective McCready's testimony that *he* "could see plainly" through the room. Op. Br. at 9. In fact, though, trial testimony established that the sun had risen on the morning in question between the time that Marty and McCready entered the room. Respondents focus on the "glove imprint blood smears on petitioner's bedroom switch plate wall," as proof of his guilt. Op. Br. at 18. In fact, though, this is only the clearest proof of the unreliability of Marty's "confession," which never mentioned the use of any such gloves, and no such gloves were ever linked to Marty.

In doing so, the Second Circuit explained that this was not the rule in all jurisdictions, as exemplified by its discussion of New York state jurisprudence which continues to apply the pre-*Elstad* rule. "Thus, under New York law the rule with respect to *Miranda* warnings remains that '[l]ater is too late unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning.'" App. at 18a. The Second Circuit recognized that under the New York rule, *i.e.*, fruits analysis, Marty's post-warning statements would have been inadmissible because there had been no break in the interrogation. App. at 18a. But the Second Circuit found federal law, under *Elstad*, to be to the contrary.

The issue presented is whether the Second Circuit's restrictive interpretation of *Elstad* is correct, when four other circuits have interpreted *Elstad* more liberally to permit a "fruits" analysis in appropriate circumstances. This case frames that interpretive issue in the best fact pattern possible: a lengthy, increasingly hostile interrogation that indisputably lacked a break between the *Mirandized* and un-*Mirandized* portions of the questioning. On these stark facts, the petition raises a purely legal question for resolution.

II. THE CIRCUIT SPLIT IS REAL

Respondents attempt to bury the circuit split on this issue through a microscopic dissection of bits and pieces of *some* of the cases cited as evidence of that split in our petition. Thus, they assert that *some* cases cited by petitioner differ in their facts from one another, they state that the split exists in dicta rather than holdings, or they flatly mischaracterize the cases. This is nothing but "smoke and mirrors" advocacy. Notwithstanding respondents' rhetoric to the contrary, the circuits are in fact split between those who believe *Elstad* permits a "fruits" test even when the unwarned statement was constitutionally voluntary, and those who do not.

For example, respondents plainly misinterpret *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989), when they suggest that all the Eighth Circuit did was distinguish *Carter* from *Elstad*. (Op. Br. at 23) Of course the Eighth Circuit had to distinguish *Elstad* in some fashion to reach a different result. What is significant is *how* the Eighth Circuit distinguished *Elstad*. It did so by interpreting *Elstad* to permit a fruits analysis,[2] and then applying such an analysis to Carter's case:

> [T]here was no passage of time to speak of between the unwarned confession and the subsequent warnings and confession, all of which occurred as part and parcel of a continuous process. Thus, the second confession came almost directly on the heels of the first. Although *Elstad* precludes the formulation of a "rigid rule" in determining the admissibility of the second confession, our review of "the surrounding circumstances and the entire course of police conduct with respect to the suspect" convinces us that the second confession cannot be allowed into evidence.

884 F.2d at 373. Thus, the Eighth Circuit applied a fruits test, finding such a test still permissible in the wake of *Elstad*. Circuits on the other side of the split, including the Second Circuit below, disagree with this interpretation of *Elstad*.

Further, respondents inappropriately minimize the importance of the First Circuit's *Miranda* discussion in *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998), by seeking to dismiss it as dicta. (Op. Br. at 22-23) It was, to the

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[2] Circuit Judge Beam's dissent in *Carter* makes this point perfectly clear. *See* 884 F.2d at 376.

contrary, a significant part of the rationale for the First Circuit's holding in that case. The First Circuit wrote:

> Some circuits have taken the view that *Elstad* is the end of any use of the fruits doctrine based on a *Miranda* violation.[] Yet *Elstad* itself involved what most people would regard as a highly "technical" violation of *Miranda* – a volunteered statement by the suspect in his own home before being taken to the police station. . . . Our own view, highly tentative in the absence of more guidance from the Supreme Court, is that *Elstad* would be hard to confine to technical violations . . .. But by the same token we think that *Elstad* does not wholly bar the door to excluding evidence derived from a *Miranda* violation. . . .

145 F.3d at 409-10. Like the Eighth Circuit in *Carter*, the First Circuit then concluded that in *Elstad*, "the Supreme Court was not laying down an iron rule debarring a 'fruits' argument in all *Miranda* cases." 145 F.3d at 410.

Respondents further seek to distinguish *Byram* by asserting that "Byram's first statement was not clearly voluntary." (Op. Br. at 22) That is simply not true. To the contrary, the First Circuit held that it did not even have "serious doubts" about the voluntariness of the unwarned statements and thus was required to address the "unusually difficult" question whether a fruits analysis was available under *Elstad*. 145 F.3d at 407. Accordingly, the *holding* of *Byram* turned precisely on the *Elstad* issue. Whatever factual differences might exist, it could not be clearer that the First Circuit's decision was driven by its conclusion that *Elstad* did not wholly bar a fruits analysis when there is a *Miranda* violation and a voluntary pre-warning statement. Why else would that Court of Appeals have seen the need to ask for "more guidance from the Supreme Court" on this very issue?

Respondents apparently do not disagree with the substance of petitioners' discussion of *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992). (Op. Br. at 24) In distinguishing *Carter*, the D.C. Circuit stressed that in *Gale*, an hour passed between the pre- and post-warning statements, and only one improper question was asked before the warnings. In emphasizing these facts, the D.C. Circuit implicitly instructed that the passage of time between statements and the connection between the pre- and post-warning statements were factors to consider in determining whether to suppress a post-warning statement. These are fruits analysis factors.

Further, respondents' discussion of *United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994), misses the point. Respondents state that the Tenth Circuit's opinion distinguishing *Carter* did not indicate confusion regarding *Elstad*. (Op. Br. at 24) But we never argued that the *McCurdy* Court was confused. Our point instead was simply that the Tenth Circuit, like the Eighth, First and D.C. Circuits, expressed support for the use of a fruits analysis when pre-and post- warning statements are closely linked in time. Such support is squarely at odds with the circuits on the other side of this split, like the Second Circuit below.

Respondents' argument that the circuits on the other side of the split do not really believe *Elstad* forbids a fruits analysis defies credulity. (Op. Br. at 24-25) For example, in *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995), the Fourth Circuit interpreted *Elstad* in stark terms, explaining that the *Elstad* Court had "draw[n] a sharp distinction between a situation in which the first confession is obtained as a result of police coercion and a situation in which the earlier confession is actually voluntary . . . [and] held that in the latter situation the prior confession could not be said to taint a later confession . . .." 63 F.3d at 1289. The Fourth Circuit then conducted its version of an *Elstad* analysis, holding that there could be no taint if the pre-warning

statement was not constitutionally involuntary. The Fourth Circuit expressly concluded that *Elstad* absolutely bars any fruits analysis:

> *Elstad* thus makes clear that when the initial confession . . . merely violates the technical proscriptions of *Miranda*, no taint analysis is necessary.

Id. at 1290.[3]

As discussed in petitioner's main brief, seven other circuits – the Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh – agree with the Fourth that *Elstad* absolutely bars a fruits analysis under the circumstances outlined in the issue presented. The only counter-argument offered by respondents on this point is that in three cases in these circuits – *United States v. Gupta*, 183 F.3d 615 (7th Cir. 1999), *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988), and *United States v. Johnson*, 816 F.2d 918 (3d Cir. 1987) – courts' use of terms like "may" indicate that the courts do not view *Elstad* as a bar to the fruits doctrine. (Op. Br. at 24-25) Respondents are taking isolated terms out of context in order to call into question these courts' interpretations of *Elstad*. In fact, upon full and fair analysis, the three cited decisions strongly reinforce our points.

For example, in *Gupta*, Judge Easterbrook unambiguously stated that *Elstad* "holds that *Miranda* warnings break the causal chain and permit a later confession to be used, provided that the earlier statements were voluntary." 183 F.3d at 616. Judge Easterbrook went on to say that that "nothing in the rationale of *Elstad* implies that

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[3] Significantly, the distinction drawn by the *Correll* court in reaching this conclusion is a perfect example of a lower court analysis flawed by an erroneous pre-*Dickerson* assumption that a *Miranda* violation was not a constitutional violation. *See* 63 F.3d at 1289-1290. But respondents have overlooked the importance of the decision on this point as well.

the temporal proximity (or similarity) of the pre- and post-*Miranda* warning statements makes the latter any the less valid." 183 F.3d at 618-19. There could be no clearer statement that *Elstad* bars a fruits analysis.

Similarly, in *Sangineto-Miranda*, the Sixth Circuit was quite clear that "where police simply fail to administer *Miranda* warnings, the [question of] admissibility . . . should turn on whether the statements were voluntary within the meaning of the fifth amendment," and the court therefore only examined the constitutional voluntariness of the defendant's statements, not whether there was any taint. 859 F.2d at 1518.[4] Likewise, in *Johnson*, the Third Circuit held that, "absent constitutionally impermissible coercion in eliciting an initial confession," post-warning confessions are admissible. 816 F.2d at 922. This is because, in the view of the Third Circuit and the circuit courts who side with it on this issue: "In *Elstad*, the Court specifically rejected the proposition that the 'fruit of the poisonous tree' doctrine . . . extends to violations of the *Miranda* decision." *Id.*

III. *DICKERSON* SHOWS THE NEED FOR REVIEW

Respondents entirely misperceive petitioner's argument with respect to *Dickerson v. United States*, 120 S. Ct. 2326 (2000). Petitioner's point is not that *Dickerson* announced for the first time that *Miranda* set forth a constitutional rule; to the contrary, the majority of this Court in *Dickerson* made very clear its view that *Miranda* has always been a constitutional rule and that *Dickerson* did not break new ground in that regard. Thus, respondents' *Teague v. Lane*,

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[4] The case principally cited in *Sangineto-Miranda* in support of the Sixth Circuit's decision against any "fruits" analysis, *see* 859 F.2d at 1517, is dogmatic in that conclusion: "a mere violation of *Miranda*'s 'prophylactic' procedures does *not* trigger the fruit of the poisonous tree doctrine." *United States v. Bengivenga*, 845 F.2d 593, 601 (5th Cir. 1988) (*en banc*).

489 U.S. 288 (1989), argument is wholly inapplicable to the analysis required by this petition.

Instead, petitioner's point is that many lower courts have misunderstood how to interpret *Elstad* because they erroneously believed that *Miranda* protections were not constitutionally-based in their own right. The *Dickerson* majority even "concede[d] that there is language in some of our opinions that supports the view taken" by such lower courts. 120 S. Ct. at 2333. In dissent in *Dickerson*, Justices Scalia and Thomas make the point directly that *Elstad* is one of those opinions. *See* 120 S. Ct. at 2342.

The inescapable fact is that much of the fifteen years' worth of *Elstad* jurisprudence developed in the Courts of Appeals has been colored by the mistaken impression that *Miranda* was not a constitutional rule. For example, in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), the Fourth Circuit engaged in a comprehensive discussion of the fruits doctrine in the wake of *Elstad*. The court explained:

> The *Elstad* majority, however, held that the "tainted fruits" doctrine did not apply to the second confession . . .. Specifically, the Court held that "[s]ince there was no actual infringement of the suspect's *constitutional* rights, the case was not controlled by the doctrine" . . . that fruits of a *constitutional* violation must be suppressed.

111 F.3d at 1141 (emphasis in *Elie*). The Fourth Circuit concluded, "[t]he holding[] in . . . *Elstad* could not be any clearer: the 'tainted fruits' analysis applies only when a defendant's constitutional rights have been infringed." 111 F.3d at 1142.

What is clear from the Fourth Circuit's discussion of *Elstad* in *Elie* is that its *Elstad* jurisprudence has been premised on a significant error of legal interpretation – a

belief that a *Miranda* violation did not amount to a constitutional violation. As petitioner argued in his main brief, and respondents do not contest, other circuits have made the same error. (Pet. Br. at 27) It is quite preposterous for respondents to maintain nonetheless that the Courts of Appeals issued all of their *Elstad*-based decisions under the impression that *Miranda* was a constitutional rule, when many of their opinions expressly say just the opposite.

The Courts of Appeals that have concluded that *Elstad* absolutely forbids application of any fruits analysis to *Miranda* violations tend to be those that have mistakenly interpreted *Miranda* as being non-constitutionally based. Significantly, as noted in our petition, those Courts of Appeals *may not even be free to correct their errors* in the wake of *Dickerson*. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). Respondents' brief wholly fails to respond to this additional reason for review of this issue at this time.

At bottom, there is no question that there are confused, erroneous and conflicting *holdings* in current *Elstad* jurisprudence based on the Courts of Appeals' misunderstanding of *Miranda*'s progeny and/or of *Elstad* itself. Clarification of the proper bounds of *Elstad* is urgently needed, particularly in light of *Dickerson*.[5] As Justice Scalia pointed out in dissent in *Dickerson*, questions about the proper scope and interpretation of *Elstad* arise directly from *Dickerson*. *See* 120 S. Ct. at 2342. Against the backdrop of the existing circuit split, this Court should answer those questions in this case.

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[5] Indeed, just a few weeks ago, this Court granted *certiorari* review to determine whether one of its recent decisions (*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)) would help to resolve a circuit split over a Seventh Amendment issue. *See D.C. v. Tri County Industries, Inc.*, No. 99-1953 (S. Ct. Sept. 26, 2000). The Court should do the same in this case to consider how *Dickerson* might affect the circuit split which currently exists over this Fifth Amendment issue.

CONCLUSION

It cannot be denied that Marty would likely have been granted a new trial if he had been able to bring his case in any one of the four circuits which have expressed the view that a fruits analysis is not forbidden by *Elstad*. Upon review of Marty's case, these courts would have been evaluating a factual scenario in which lengthy pre-warning statements were obtained in blatant violation of *Miranda*, without any passage of time between the first confession, the warnings, and the second confession. They would also have been evaluating a police pattern of interrogating Marty for hours in an increasingly hostile manner, lying about his father coming out of a coma, lying about forensics tests, refusing to permit him to take a polygraph test, *etc.*, that only reinforced the inherent "taint" between the continuous "pre" and "post" warning questioning. The only thing that kept the Second Circuit from reaching the same conclusion in Marty's case was its view that *Elstad* absolutely forbids a "fruits" analysis. The precious protection of the Fifth Amendment should not be such a geographically vacillating variable.

The petition for writ of certiorari should be granted.

Respectfully submitted.

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